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No. 88-1393

In the Supreme Court of the United States

OCTOBER TERM, 1988

SUPERIOR COURT TRIAL LAWYERS ASSOCIATION, ET AL.,
CROSS-PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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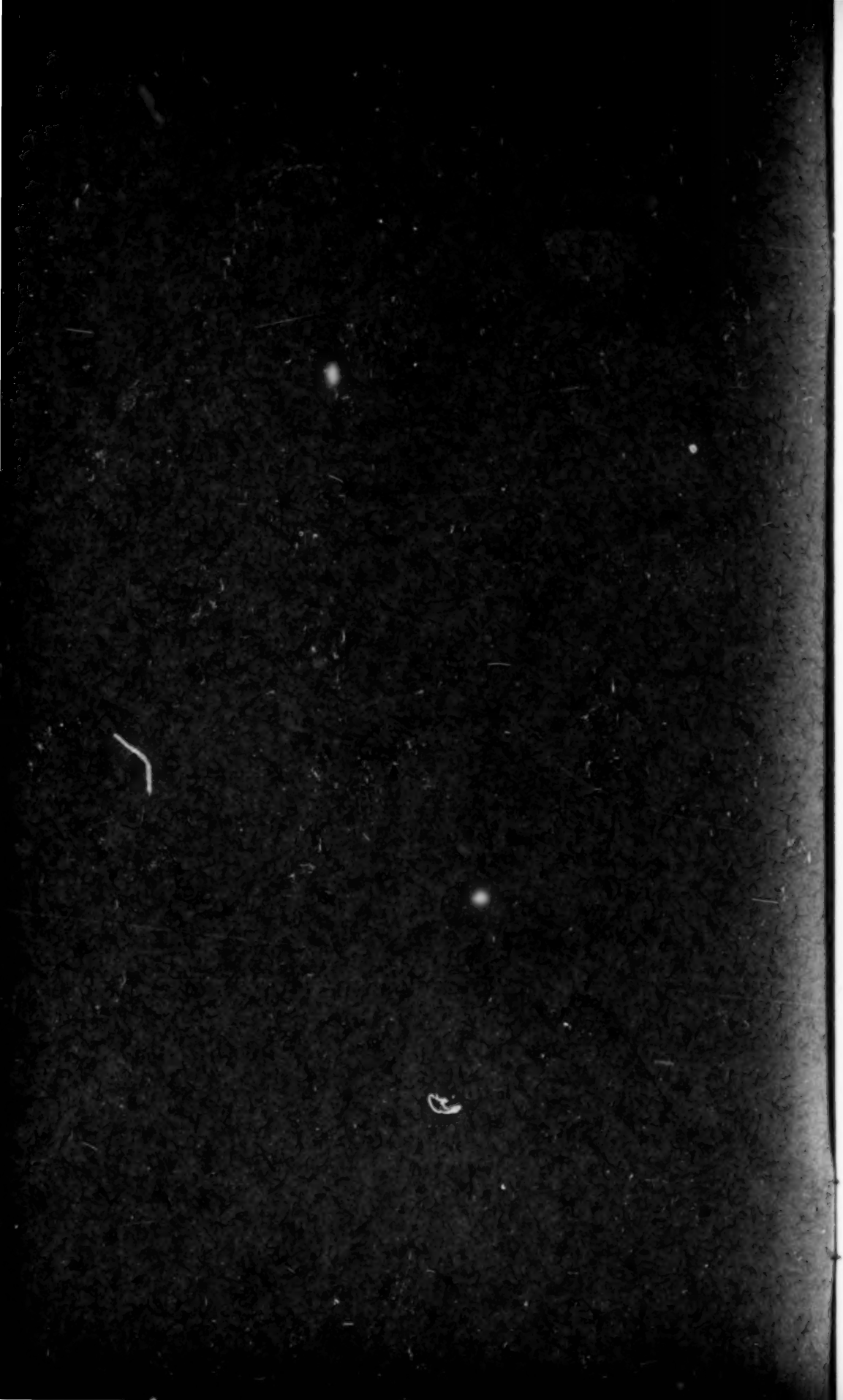

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Superior Court Trial Lawyers Association ("SCTLA") has filed a cross-petition for certiorari, contingent upon a grant of the petition filed by the Federal Trade Commission ("Commission") in No. 88-1198. SCTLA seeks review of the court of appeals' holding that SCTLA's boycott was not immunized from antitrust scrutiny by this Court's decision in *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982). That portion of the court of appeals' opinion addressing this issue discusses all pertinent decisions of this Court, creates no new law, and is not inconsistent with any decision of this Court or any court of appeals.[1] For

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[1] Also unlike the issue raised in No. 88-1198, as to which the administrative law judge, the Commission, and the court of appeals reached three different conclusions (see No. 88-1198 Reply Brief 1 n.1), the question SCTLA raises was resolved adversely to it by all

these reasons, the cross-petition should be denied even if the petition in No. 88-1198 is granted.

1. Most facts pertinent to SCTLA's cross-petition are set forth in the Petition for Certiorari in No. 88-1198 and the Opposition to it. SCTLA is an association of private practice attorneys who represent criminal defendants in the District of Columbia Superior Court, pursuant to provisions of the D.C. Criminal Justice Act, D.C. Code Ann. 11-2601 et seq. (1981 & 1988 Supp.) (the "CJA"). SCTLA members engaged in a lobbying campaign to persuade the D.C. City Council to increase the rates at which lawyers were compensated under the CJA. In conducting this campaign, both SCTLA members and others argued that it was in the public interest that CJA rates be increased.[2] When the lobbying campaign stalled, SCTLA members implemented an express agreement they had made that "unless we are granted a substantial increase in our hourly rate we will cease accepting new appointments under the Criminal Justice Act." (Pet. App. 3a-9a, 78a).

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three decisionmakers (see Pet. App. 32a-45a, 103a-132a, 209a-216a). ("Pet. App." denotes the Appendix to the Commission's Petition for Certiorari in No. 88-1198).

[2] Whatever its legal relevance, SCTLA's present contention that it sought to vindicate the Sixth Amendment rights of its members' clients was neither proven nor alleged below. As the court of appeals observed, SCTLA "ha[s] not argued the point," having "acknowledged at oral argument before the Commission that the pre-boycott level of services was adequate to secure the Sixth Amendment rights of [its members'] clients" (Pet. App. 30a). Before the Commission, SCTLA characterized the issue as involving a debate over the level of subsidized representation appropriate for indigent defendants (*id.* at 114a):

> There [was] a Chevrolet[] sort of quality . . . service being provided. There were some people who thought we really ought to have an Oldsmobile quality service.

The court of appeals recognized that an agreement among competing businessmen to withhold their services from a buyer unless and until the buyer increased its price was "the essence of 'price-fixing' " and a "classic restraint of trade within the meaning of Section 1 of the Sherman Act" (Pet. App. 16a). By contrast, both *Claiborne Hardware* and *Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir.), *cert. denied*, 449 U.S. 842 (1980), also cited by SCTLA (Cross-Pet. 5), involved so-called consumer boycotts—concerted refusals to deal by ultimate consumers in the distribution chain, designed to achieve political and social objectives. This Court has repeatedly made clear that *Claiborne Hardware* cannot be extrapolated to classic antitrust boycotts by economic competitors.[3]

In *Claiborne Hardware* itself, this Court noted the limits of its holding by quoting a characterization of the same NAACP boycott rendered by the Fifth Circuit in a related case (458 U.S. at 915, citing *Henry* v. *First National Bank of Clarksdale*, 595 F.2d 291, 303 (5th Cir. 1979)):

> There is no suggestion that * * * defendants were in competition with the white businesses or that the boycott arose from parochial economic interests. On the contrary, the boycott grew out of a racial dispute with the white merchants and city government of Port Gibson and all of the picketing, speeches, and other communication associated with the boycott were

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[3] The Court has even declined to extend the "political boycott" doctrine to confer First Amendment protection upon a secondary boycott by labor union members whose *only* purpose in conducting the boycott was political—to protest Soviet foreign and military policies. See *Longshoremen* v. *Allied Internat'l, Inc.*, 456 U.S. 212, 225-227 (1982).

> directed to the elimination of racial discrimination in the town. This differentiates this case from a boycott organized for economic ends, for speech to protest racial discrimination is essential political speech lying at the core of the First Amendment.

The Court reiterated that *Claiborne Hardware* is not to be applied to price-fixing boycotts by economic competitors last term in *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, No. 87-157 (June 13, 1988). In rejecting a claim that *Claiborne Hardware* immunized the joint actions of economic competitors in connection with the formulation of product standards to be proposed for adoption by state governments, the Court observed (slip op. at 14-15 (emphasis added)):

> In [*Claiborne*] we held that the First Amendment protected the nonviolent elements of a boycott of white merchants organized by the National Association for the Advancement of Colored People and designed to make white government and business leaders comply with a list of demands for equality and racial justice. Although the boycotters intended to inflict economic injury on the merchants, *the boycott was not motivated by any desire to lessen competition or to reap economic benefits* but by the aim of vindicating rights of equality and freedom lying at the heart of the Constitution, and *the boycotters were consumers who did not stand to profit financially from a lessening of competition in the boycotted market. Id.* at 914-915. Here, in contrast, *petitioner was at least partially motivated by the desire to lessen competition, and, because of petitioner's line of business, stood to reap substantial economic benefits from making it difficult for respondent to compete.*

This Court's own prior statements leave no doubt that this case, in which a trade association of lawyers has en-

gaged in a direct restraint of trade to secure a "substantial increase in our hourly rate" is simply not a "*Claiborne*-type boycott[]" as SCTLA contends (Cross-Pet. 3 n.3).[4]

2. This Court's own repeated and recent statements in *Claiborne Hardware* and *Allied* about the proper scope of the "political boycott" doctrine suffice by themselves to show that there is no reason to grant the cross-petition in this case.[5] A further reason is that SCTLA has failed to identify any principled way in which the "political boy-

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[4] SCTLA finds it significant that the *Claiborne Hardware* boycotters sought, by eliminating racial discrimination against themselves, to benefit economically, through increased employment opportunities (Cross-Pet. 3, 4). In response to the same observation in *Allied*, however, the Court made clear that such a benefit is not analogous to the object of an agreement wherein economic competitors seek simply "to profit financially from a lessening of competition in the boycotted market" (*Allied*, slip op. at 15). Thus, nothing in the holding of the court of appeals or the position of the Commission could possibly create the threat of anti-trust challenge to the type of consumer boycott in *Claiborne Hardware*, as SCTLA suggests (Cross-Pet. 3 & n.6).

[5] Moreover, there is no inconsistency, as SCTLA implies (Cross-Pet. 6), between this Court's limitation of the "political boycott" doctrine to cases not involving parochial economic interests, and the protection provided by the *Noerr-Pennington* doctrine for businessmen seeking to further precisely those interests. *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), established that joint lobbying activities by competitors, designed to induce the government to restrain trade to the competitors' benefit, do not become antitrust violations merely for that reason. But as *Allied* makes clear, *Noerr-Pennington* does not legalize "horizontal price agreements * * * or horizontal output restrictions" undertaken directly by competitors themselves (slip op. at 9-10). To combine *Noerr*'s protection of anticompetitively motivated lobbying by competitors with *Claiborne Hardware*'s protection for boycotts, while disregarding the limits placed by the Court on each doctrine, would seriously erode vital antitrust protections.

cott" doctrine could be expanded to protect its price-fixing boycott without opening an even more gaping loophole in the antitrust laws than that threatened by the market-power requirement at issue in No. 88-1198.

SCTLA suggests that the special treatment it seeks for the lawyers in this case can be denied most other competitors because, in seeking a price increase for their services, the lawyers were acting as "surrogates" for persons "who could not or would not act for themselves" (Cross-Pet. 7). But many businessmen who provide goods and services paid for by governments and other institutions[6] can (and do) claim to be surrogates for the individuals who will benefit from those goods and services. Most pointedly, in the Commission's experience, physicians who treat Medicaid patients are every bit as much "surrogates" for those indigent persons when they seek an increase in Medicaid reimbursement rates as the SCTLA lawyers were "surrogates" for the indigent accused. This, however, does not entitle doctors collectively to withhold their services unless their rates are raised anymore than it should entitle lawyers to do so.

SCTLA's other proposed distinction is that its boycott was allegedly designed to vindicate Sixth Amendment rights, whereas most other government suppliers cannot purport to justify demands for higher billing rates by citing a specific constitutional amendment. As earlier noted (n.2, *supra*), SCTLA did not raise this claim – much less prove it – before either the Commission or the court of appeals. Given "a record that does not support, and * * * petitioners who do not seek, a finding that the pre-boycott

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[6] The term "other institutions" is appropriate here because *Claiborne Hardware* itself involved a boycott against private businesses; the extension of its holding SCTLA wishes could not logically be limited to boycotts against the government.

rates resulted in systematic violations of the Sixth Amendment" (App. 31a-32a), this Court would have difficulty invoking such alleged violations to limit the broad erosion of antitrust protections that SCTLA's cross-petition invites.[7]

For the foregoing reasons, the cross-petition for certiorari should be denied even if the petition in No. 88-1198 is granted.

Respectfully submitted,

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[7] Indeed, before the court of appeals SCTLA took the opposite position, *i.e.*, that the legality of its boycott should not turn at all upon whether its members sought to vindicate the constitutional rights of their clients or sought merely to improve the quality of legal care they received ("Brief for Petitioners," No. 86-1465 (D.C. Cir., June 25, 1987) at 36-37). We agree with SCTLA's position before the court of appeals. There is no apparent reason why the antitrust obligations (or the First Amendment rights) of competitors should turn on whether they offer a service the government is expressly required to provide by the Bill of Rights or whether they merely offer services needed by the government to "provide for the common defence" or "promote the general Welfare" (Preamble, United States Constitution). If lawyers did have a constitutional right collectively to withhold their services from the government "unless we are granted a substantial increase in our hourly rate" (Pet. App. 78a), the same novel right could not be denied a great many others.

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